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No. 97-5310

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DAVID R. AND LINDA M. BEACH,
Petitioners,

v.

OCWEN FEDERAL BANK,
Respondent.

On Writ of Certiorari
To The Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONERS

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STATEMENT OF THE CASE

AARP adopts the Petitioners' statement.

STATEMENT OF INTEREST[1/]

The American Association of Retired Persons (AARP) is the nation's leading organization for people age 50 and older. Approximately twenty-five and one-half million of its members are homeowners.[2/] In representing the interests of its members, AARP seeks to: (1) enhance the quality of life for individuals as they grow older; (2) further independence, dignity and purpose for individuals as they grow older; and (3) improve the image of aging.

AARP's advocacy efforts have focused on disclosure protections and combating fraud and abuse against older people in a wide range of consumer transactions. AARP has appeared as *amicus curiae* in numerous federal and state court proceedings that impact the rights and interests of older persons. AARP has expressed particular interest in the two most recent amendments to the Truth in Lending Act ("TILA"). AARP advocated for passage of the Home Ownership and Equity Protection Act of 1994 ("HOEPA") which amended TILA to provide increased protections for homeowners targeted by unscrupulous and high cost lenders.[3/]

[1/] Consents filed Nov. 26, 1997. AARP's brief has not been approved or financed by petitioners or their counsel, or any other party.

[2/] In addition, seventy-eight percent of the sixty-five plus population are homeowners. India Walsh, U.S. Bureau of the Census and the Department of Housing and Urban Development, *American Housing Survey* (1995).

[3/] Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2190-94 (Subtitle B of Title I, known as the Home Ownership and Equity Protection Act of 1994, effective for loans consummated after October 1, 1995, amends

(continued...)

In addition, AARP sought to modulate the industry's efforts to roll back consumer protections in the 104th Congress through participation in the legislative process leading up to the 1995 Amendments to TILA. AARP has been a long-time advocate of enhanced protections for consumers in areas affecting home ownership and consumer credit. Through comments before federal agencies in rulemaking proceedings, AARP has continued to express its views on behalf of members who are impacted by the Truth in Lending Act.[4/]

Over the past six years, AARP-sponsored Legal Counsel for the Elderly (LCE)[5/] has represented over one hundred elderly, low income homeowners who have been victimized by abusive and predatory home equity lenders. Through this representation, AARP has gained a heightened awareness of the fraudulent practices of a segment of the mortgage lending industry that pose a threat to elderly homeowners. Moreover, AARP is concerned that these practices are not diminishing, but are becoming more widespread throughout the mortgage lending industry.[6/] The abuses experienced by many older

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3/(...continued)
TILA, 15 U.S.C. §§ 1602 and 1639.)

4/ In addition, AARP recently participated in a 1997 Federal Reserve Board hearing which addressed whether the finance charge under TILA should be redefined to include all costs associated with the extension of credit. *Federal Reserve Board Hearing on Finance Charges* (June 17, 1997) (testimony of Jean Constantine-Davis, Staff Attorney AARP) (on File at AARP).

5/ LCE is a separate 501(c)(3) organization that receives support from AARP and its affiliate, the AARP Foundation.

6/ AARP testified at a hearing before the Federal Reserve Board on concerns regarding abuse in the home equity lending market. *Federal Reserve Board Hearing on HOEPA*. (June 17, 1997) (testimony of Nina (continued...)

homeowners often challenge the most basic tenets of TILA, such as failing to provide homeowners with disclosures and loan documents until after the running of the three-day rescission period.

AARP submits this brief as *amicus curiae* to inform the Court regarding its members' interests in retaining the right to assert TILA rescission as a claim in recoupment. AARP urges the Court to reverse the Florida Supreme Court's decision in *Beach*[7/] and to preserve this very important right for homeowners faced with foreclosure.

SUMMARY OF ARGUMENT

Petitioners and consumer *amici* seek to preserve legal concepts substantially settled under the Truth in Lending Act for the last seventeen years, and recognized in the federal doctrine of recoupment since at least 1935. Respondent and the mortgage industry *amici* oppose the well established doctrine of rescission in recoupment and seek to obtain from this Court the relief they failed to obtain from Congress.

Prior to the decisions in *Beach,* it was well established that homeowners could defend against a lender's foreclosure action by raising a claim of rescission in recoupment. In fact, in at least six decisions since 1984, the Truth in Lending Act has been interpreted to allow defensive rescission in recoupment after the statute of limitations on affirmative claims had run. The Florida courts' decisions in *Beach*

6/(...continued)
F. Simon, Staff Attorney AARP) (on File at AARP).

7/ *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997), *aff'g* 670 So.2d 986 (Fla. Dist. Ct. App. 1996), *cert. granted sub nom., Beach v. Ocwen Fed. Bank*, 18 S.Ct. 294 (U.S. Oct. 14, 1997) (97-5310).

deviated from the well established, informed, and reasoned judicial consensus on this issue.

The *Beach* court failed to recognize the centrality of rescission to TILA's self-enforcing statutory scheme. While the 1995 Amendments to TILA granted the mortgage industry relief from certain kinds of misdisclosures, Congress' intent to grant special protection--including rescission in recoupment--to borrowers facing foreclosure is clear from both the plain language and legislative history of these amendments. Congress recognized the need to allow these homeowners the right to statutory defenses which may have lain dormant because most homeowners do not assert rescission claims until the lender presents no other option. The *Beach* court ignored Congress' rejection of industry sponsored legislation to expressly eliminate TILA's recoupment defense. Moreover, the *Beach* court misinterpreted the doctrine of federal recoupment and improperly employed state law to deny access to this valuable federal claim.

This brief demonstrates that the rescission remedy furthers the compelling public policy which underlies the Truth in Lending Act. The 1995 Amendments require reversal of the Florida court decision. The brief examines the faulty reasoning underlying the *Beach* decision and demonstrates that the public policy underlying TILA is strengthened by the existence of the recoupment claims here challenged. These claims enable people to preserve their homes and vindicate their right to be fully informed of the terms of their mortgage loans.

Beach's abolition of rescission in recoupment poses a very real threat to individual homeowners, many of whom have been victimized by unscrupulous lenders. Under *Beach*, lenders would be permitted to benefit from their wrongdoing and foreclose, despite often gross violations of Truth in Lending disclosure obligations. The real risk is that

individual rights to fair play in the home loan arena will be further eroded if the holding in *Beach* is not reversed.

ARGUMENT

I. THE RIGHT OF RESCISSION IS CRITICAL TO THE SELF-ENFORCEMENT STATUTORY SCHEME OF TILA.

A. TILA Is A Remedial Statute Whose Self-Enforcement Scheme Is Dependent On Rescission.

TILA was enacted to insure that consumers are properly informed of the terms of their credit, to protect consumers from divergent and often fraudulent practices,[8/] and to balance the scales thought to be weighted heavily in favor of lenders.[9/] TILA creates a system of disclosure that improves the bargaining posture of all borrowers and requires strict technical compliance,[10/] regardless of actual injury, thereby promoting the standardization of credit terms for the benefit of all consumers. *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1181 (11th Cir. 1982); *Johnson v. Steven Sims Subaru Inc.*, No. 92 C6355, 1993 U.S. Dist. LEXIS 8078 *4,

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[8/] *See In re Shaw*, 178 B.R. 380, 385 (Bankr. D.N.J. 1994).

[9/] *Bizier v. Globe Fin. Servs., Inc.*, 654 F.2d 1, 3 (1st Cir. 1981); *see also N.C. Freed Co. v. Board of Governors*, 473 F.2d 1210, 1214 (2d Cir. 1973), *cert. denied*, 414 U.S. 827 (1973).

[10/] Courts have imposed strict liability under TILA even where violations are perceived to be technical or minor. *New Maine Nat'l Bank v. Gendron*, 780 F. Supp. 52, 57 (D. Me. 1991); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983); *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699, 704 (9th Cir. 1986).

(N.D. Ill. 1993); *Smith v. Chapman,* 614 F.2d 968, 971 (5th Cir. 1980).

The right to rescind is pivotal to enforcement of TILA's statutory scheme, acting as a deterrent to creditors who would otherwise violate consumer rights to meaningful disclosure. *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1140 (11th Cir. 1992). The inclusion of the right to rescind in TILA was a recognition of the preeminence home ownership had achieved in the United States and the need to safeguard it from the misrepresentations and fraudulent practices of an unregulated marketplace.[11/] This role was reinforced by the recent amendments creating HOEPA, in which the right of rescission was selected as the remedy of choice to enforce compliance with new statutory requirements and prohibitions.[12/] Moreover, the public is dependent on individual consumers acting as "private attorneys general" to enforce the disclosure system envisioned by TILA. *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978).

In creating the extended right to rescind a loan transaction, Congress expressed a strong public policy mandating disclosure of material terms of the loan transaction. Congress determined that this policy was of such importance that it created the unique and powerful private enforcement mechanism of rescission to ensure lender compliance with disclosure obligations. While the remedy has been the subject of criticism in recent years, the severity of the remedy is directly proportional to the severity of the potential loss suffered by homeowners who lose their homes to foreclosure. Congress understood that TILA must be, to a large extent,

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[11/] *See* Ralph J. Rohner, *The Law of Truth in Lending*, ¶ 8.01[3] at 8-4 (1984).

[12/] *See* discussion of HOEPA *infra* pp. 27-30 and *supra* note 3.

self-enforcing.[13/] The powerful remedy of rescission was Congress' tool of choice to police compliance.

B. The 1995 Amendments Emphasize The Importance of Rescission In Foreclosure.

A few years ago, the case of *Rodash v. AIB Mortgage, Co.*[14/] created concern in the mortgage lending industry that lenders might be subject to liability on a large scale for violations of the Truth in Lending Act. Many of the industry *amici* represented in this case sought relief from Congress from this liability, arguing that "technical" and "inconsequential" errors could cause losses of $217 billion and could "potentially impair the safety and soundness of all types of lenders."[15/] (*See* Letter from Rep. Bill McCollum, 3/8/95) (App. 1).

Congress responded to this plea for relief in September 1995 by enacting the Truth in Lending Act Amendments.

[13/] *Williams*, 968 F.2d at 1140. *See also, Aquino v. Public Fin. Consumer Discount Co.*, 606 F. Supp. 504, 508 (E.D. Pa. 1985).

[14/] 16 F.3d 1142 (11th Cir. 1994). It is important to note that while the *Rodash* decision generated a great deal of controversy regarding the more technical violations in Mrs. Rodash's mortgage loan, the decision to allow her to rescind was independently based on the court's finding that the creditor committed a material violation of TILA by having her sign at closing an "Election Not to Cancel" which effectively vitiated her right to rescind. *Rodash*, 16 F.3d at 1145-48.

[15/] *Truth in Lending Act Amendments of 1995: Hearings Before Fin. Insts. and Consumer Credit Subcomm. of House Banking and Fin. Servs. Comm.*, 104th Cong. (1995) (testimony of American Bankers Ass'n); *Truth in Lending Act Amendments of 1995: Hearings Before Subcomm. on Fin. Insts. and Regulatory Relief of the Senate Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. (1995) (testimony of Consumer Bankers Ass'n).

AARP took a special interest in this legislation, attempting to strike a balance between the mortgage industry's desire for relief and the need to protect the integrity of TILA for homeowners, young and old. The 1995 Amendments granted the mortgage industry relief by creating a moratorium on class action lawsuits based on misdisclosure of certain fees and charges and by retroactively forgiving misdisclosure of those fees and charges. Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, 109 Stat. 276 (codified as amended at 15 U.S.C.A. §§ 1601-1649 (1995)).[16/] This was the limited relief that was necessary to prevent the catastrophe predicted by the industry as a result of *Rodash*.

However, at the industry's behest, the 1995 Amendments to TILA went further. In many cases, disclosure errors no longer entitle consumers to relief, nor subject creditors to liability since the industry is now permitted to treat *as accurate* erroneous disclosures of the finance charge, ranging from one half of one percent to one percent of the loan amount.[17/] While misdisclosures of certain fees were simply forgiven across the board, other disclosure violations were retained intact. Violations such as misdisclosure of the

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[16/] Individual rescission claims, asserted prior to June 1, 1995-- such as the Beaches'--are grandfathered and are not subject to the retroactive immunity afforded the mortgage industry. 15 U.S.C. § 1649(b).

[17/] *See* discussion *infra* note 21. While the 1995 Amendments raised:

> . . . the bar that determines what constitutes a violation. . . . to protect lenders from the small errors in judgment that occurred in the *Rodash* case. . .[i]t is obviously not intended to give lenders the right to pad fees up to the tolerance limit . . . .

141 Cong. Rec. S14567 (Sept. 28, 1995) (statement of Sen. Sarbanes). Despite the fact that the 1995 Amendments allow more "play" in disclosing the finance charge, they retain the strict liability standard for other material disclosures and for finance charge disclosures outside the new tolerances.

broker's fee were forgiven as long as the borrower was not in foreclosure.[18/] In addition, while some members of the mortgage industry sought to have Congress make rescission unavailable in recoupment,[19/] others urged that rescission be eliminated altogether.[20/] *See infra* Part II. A.

In the face of these generous tolerances and forgivenesses, it is difficult to explain industry concerns regarding the burdens of TILA. Most of the technical violations that might subject lenders to liability were forgiven and even where violations have not been forgiven, large tolerances for errors have drastically reduced the industry's exposure to liability as compared to that which existed just two years ago. And yet, the industry is unsatisfied with the relief accorded them by Congress and demands more.[21/]

[18/] 15 U.S.C. §§ 1635(i)(1)(A), 1649.

[19/] *See supra* note 15 (testimony of American Bankers Ass'n. and Consumer Bankers Ass'n.)

[20/] The National Association of Federal Credit Unions (NAFCU) advocated the repeal of TILA, while the Credit Union National Association (CUNA) urged the elimination of the three day right of rescission for most loans. *Truth in Lending Act Amendments of 1995: Hearings Before House Banking Fin. Inst. & Consumer Credit Subcomm.*, 104th Cong. (May 23, 1995) (testimony of NAFCU and CUNA).

[21/] Prior to the 1995 Amendments to TILA, homeowners who received inaccurate disclosures of the finance charge that varied by more than $10 from the accurate finance charge and whose inaccuracy was based on the creditor's erroneous *legal conclusion* and not on a *bona fide error*, were permitted to rescind their mortgages. 12 C.F.R. pt. 226.18(d), n. 41 (1995) ("Regulation Z"); 15 U.S.C. § 1640(c). Following the 1995 Amendments, homeowners lost their right to rescind for disclosure violations based on, for example, the creditor's failure to include the broker's fee in the finance charge (for loans

(continued...)

C. Subsection 1635(i) Revives Rescission Rights in Foreclosure.

Having reduced the remedies available to many home borrowers, particularly the right of rescission, Congress was careful to recognize the class of borrowers in foreclosure as especially deserving of heightened protections. In the foreclosure context, Congress retained the remedy of rescission largely intact, determining that stricter rules of compliance and greater access to rescission were required. 15 U.S.C. §1635(i).

Congress revived the right of rescission for a borrower facing foreclosure where disclosure violations fall in any one of three categories[22/] or when raised as a claim in recoupment.

[21/](...continued)
before October 1, 1996), 15 U.S.C. § 1649(a)(1)(D), or if the finance charge disclosure is considered *accurate* because errors of up to ½ of 1% of the finance charge are *tolerated* (this could amount to as much as $500 on a loan of $100,000). 15 U.S.C. § 1605(f). Under this complex scheme, some homeowners may be entitled to file suit for statutory damages based on the defective finance charge disclosure, but are not eligible to rescind. That is because there is a lower threshold for tolerating inaccuracies in the finance charge when the homeowner is seeking statutory damages than when seeking rescission, with the result that a disclosure is considered *accurate* or *inaccurate*, depending on the remedy sought. If, however, such homeowners should later fall into default and are faced with foreclosure, two of the otherwise-forgiven disclosure errors (with a $35 tolerance for accuracy) are revived as a basis for the homeowner to assert a right to rescind. 15 U.S.C. § 1635(i). If the creditor seeks to foreclose within three years from consummation of the loan, the borrower's right to rescind is fully revived and can be asserted through an affirmative suit for rescission, either in state, federal or bankruptcy court or can be raised as a defense in response to a foreclosure action. 15 U.S.C. § 1635(i)(3).

[22/] The three categories of disclosure violations which were forgiven for (continued...)

This statutory relief provided by 15 U.S.C. § 1635(i) is directly applicable to Mr. and Mrs. Beach in that it reaffirms their ability to rescind in recoupment after three years.[23/]

D. The Analysis Underlying *Dawe* And Its Progeny Supports The Purposes Of TILA.

As the vast majority of courts which have considered this issue have concluded, the three-year limit on the right of rescission is a statute of limitations, and does not bar defensive rescission. *Dawe v. Merchant's Mortgage and Trust Corp.*, 683 P.2d 796, 800 (Colo. 1984); *In re Shaw*, 178 B.R. 380, 386-87 (Bankr. D.N.J. 1994); *Community Nat'l Bank & Trust Co. v. McClammy*, 525 N.Y.S.2d 629 (N.Y. App. Div. 1988);[24/] *FDIC v. Ablin*, 532 N.E.2d 379, 382 (Ill. App. Ct. 1988); *Westbank v. Maurer*, 658 N.E.2d 1381, 1389-91 (Ill. App. Ct. 1995); *In re Botelho*, 195 B.R. 558 (Bankr. D. Mass. 1996), *appeal docketed*, *Citicorp Mortgage Inc. v. Botelho*, No. 97-535 (1st Cir. May 7,

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[22/](...continued)
borrowers generally and revived for borrowers in foreclosure are violations based on failure to include the broker's fee in the finance charge, (15 U.S.C. § 1635(i)(1)(A)); failure to provide the proper form of notice of right to rescind (§ 1635(i)(1)(B)); and underdisclosure of the finance charge by more than $35 (§ 1635(i)(2)).

[23/] As §1635(i)(4) makes clear, §1635(i)(3) is applicable to all loans in existence on or after September 30, 1995, including the Beaches' mortgage transaction.

[24/] Adopting an independent analysis which did not rely on *Dawe*, New York's Appellate Division reached the identical result. The court permitted the homeowner to raise a claim for TILA rescission as a defense to a foreclosure action, finding that the rescission claim "would arise out of the same transaction as that sued upon." *McClammy*, 525 N.Y.S.2d at 631-2. *See also First Trust Nat'l Ass'n v. Chiang*, 662 N.Y.S.2d 136, 137 (N.Y. App. Div. 1997) (mem.).

1997).[25/] Prior to the Florida courts' recent decisions in *Beach v. Great Western Bank*, 692 So.2d 146 (Fla. 1997), *aff'g* 670 So.2d 986 (Fla. Dist. Ct. App. 1996), there were no court decisions denying a homeowner the right to assert a time-barred claim for rescission as a claim in recoupment.[26/]

The *Dawe* case has been the law for thirteen years with no apparent ill effects on the mortgage industry. We are therefore concerned about the mortgage industry's resort in these cases to predictions of dire consequences should this Court uphold the clear Congressional mandate to allow rescission in recoupment. In briefs before the Court of Appeals for the First Circuit, industry *amici* predict a "flood of litigation," "avalanche of individual cases," and billions of dollars of losses.[27/] These claims are reminiscent of the

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[25/] *See also, Taylor v. Domestic Remodeling, Inc.*, 97 F.3d 96 (5th Cir. 1996).

[26/] In contrast, equitable tolling has *not* expanded the three-year limitations period to permit a direct, *affirmative* claim for rescission, even in the face of intentional and fraudulent concealment. *King v. California*, 784 F.2d 910, 913-16 (9th Cir. 1986). The distinction between rescission by equitable tolling and rescission in recoupment is very real. In recoupment, the most a homeowner can receive is a cancellation of the future liability under the debt. To illustrate, *see* case cited *infra* note 32, regarding Edna Robinson, an older woman who asserted the right of rescission as a claim in recoupment in response to a foreclosure action. The rescission calculation revealed that she had already paid the lender several thousand dollars more than she owed. She was not able to collect one dollar of that overpayment as a claim in recoupment. In contrast, if she could have expanded the three-year limitations period by asserting equitable tolling and therefore asserted an affirmative rescission claim, she could have recovered those thousands of dollars from the lender, in addition to canceling the mortgage and any future liability under the note.

[27/] Brief on Appeal of Industry *Amici* at 7-12, *In re Botelho*, 195 B.R. (continued...)

hyperbolic rhetoric used in the wake of the *Rodash* decision, where industry concern quickly turned to alarm and then to panic because of the use of just such rhetoric. There is not a scintilla of evidence to support the industry's contention that permitting rescission in recoupment will trigger mass rescissions by homeowners in foreclosure.[28/]

The suggestion that a decision for the Beaches will lead to strategic defaulting by homeowners is, perhaps, the most implausible hyperbole of all.[29/] The industry cannot seriously contend that a decision for the Beaches would cause massive numbers of homeowners--who are not now in arrears on their mortgages--to risk their good credit, their good reputations, and the very roof over their heads by deliberately putting themselves into foreclosure in order to avail themselves of rescission in recoupment.

As the courts have frequently recognized, homeowners do not benefit from sitting on their rights; lenders do. These courts have concluded that construing the three-year limit as an absolute bar would allow lenders to violate their borrowers' rights to accurate disclosures about the cost of their credit, and then avoid liability under TILA by waiting three years to enforce their claims. While this behavior would certainly benefit the lender, who would be free to foreclose without concern for TILA liability, the homeowner is better served if s/he discovers a TILA violation during the

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[27/](...continued)
558 (Bankr. D. Mass. 1996), *appeal docketed, Citicorp Mortgage Inc. v. Botelho*, (1st Cir. May 7, 1997) (No. 97-1535) (App. 2).

[28/] As Ocwen's Br. in Opp. to Pet. for Cert. at 16 concedes, ". . . the percentage of loans in default is small, and the percentage of defaulting borrowers who raise truth-in-lending rescission rights is even smaller.."

[29/] *Beach*, 692 So.2d at 151-52 (Fla. 1997).

three-year period and can file an affirmative lawsuit against the lender.[30/]

The industry *amici* are not the only ones impacted by the availability of the extended right to rescind. It is homeowners, the very individuals for whose benefit the statutory right of rescission was created, who will suffer devastating effects if the right of rescission is curtailed. These homeowners will be impacted, not in billions of dollars, and not as an industry, but *one home at a time*. All homeowners[31/] who have struggled to maintain their mortgage payments will lose their right to assert rescission in recoupment should circumstances force them into default. Surely this was not the intended result when Congress created special rights and remedies for homeowners facing foreclosure and permitted the assertion of rescission as a claim in recoupment.

Many older, low income homeowners scrape and borrow to avoid default on loans that should never have been made.[32/]

[30/] A consumer who asserts an affirmative claim for rescission within the three-year period can not only void the lender's security interest and cancel future debt, but can also recover affirmatively from lender: any amounts paid in excess of the rescission amount and statutory damages. Such a consumer could have an affirmative recovery against a lender where the settlement costs (which are deducted from principal owing to the lender) comprise a large percentage of the loan amount.

[31/] The unavailability of rescission in recoupment will affect all homeowners, including those who have been victimized by unscrupulous lenders and who are most likely to fall into default and face foreclosure. It would be incongruous if, in their efforts to responsibly pay on an unaffordable loan, they should manage to last beyond three years and thereby jeopardize their right to rescind.

[32/] *See, e.g., Robinson v. First Gov't Mortgage & Investors Corp*, RP
(continued...)

The industry has suggested that these borrowers, whom Congress clearly intended to protect, be penalized for not defaulting on their loans earlier. That is an untenable position, and one which is without support in the Truth in Lending Act Amendments.

II. THE 1995 AMENDMENTS TO TILA RECOGNIZE A HOMEOWNER'S RIGHT TO ASSERT RESCISSION AS A CLAIM IN RECOUPMENT.

The industry has contended that the 1995 amendments to TILA settled the question of whether a homeowner can rescind in recoupment in response to an action by the lender to foreclose. We agree. However, a careful examination of the language of the 1995 Amendments to TILA and the legislative process leading to their enactment reveals that the Amendments settled the question in a manner quite opposite from the position of the industry.

A. The Absolute Limitation Language Sought By The Industry Failed To Survive The Legislative Process.

The bill which passed Congress in September 1995 was the last of a series of bills proposed in Congress in 1995 to amend the Truth in Lending Act. At least four separate

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[32/](...continued)
No. 1209-95 (D.C. Super. Ct., March 7, 1995)(Complaint on file at AARP). Mrs. Robinson, an elderly, retired homeowner, was victimized by a lender who saddled her with an unaffordable loan. She was able to make mortgage payments for several years, only after re-entering the workplace with a part-time job. Her age and disabilities ultimately forced her into retirement and into default on her mortgage after four years. She rescinded her mortgage as a claim in recoupment. The lawsuit was ultimately settled and Mrs. Robinson retained her home.

precursor bills were introduced by Members of the 104th Congress prior to the enactment of the Truth in Lending Act Amendments of 1995.[33/] Each of these bills proposed virtually identical language creating an absolute three-year bar on TILA's right of rescission.[34/] None of the bills containing this absolute bar language survived.

The following language appeared in H.R. 1858 as originally introduced:

> **SEC. 111. LIMITATION ON RESCISSION PERIOD.**
>
> Section 125(f) of the Truth in Lending Act (15 U.S.C. § 1635(f)) is amended by adding at the end the following sentences:
>
> The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of the three-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of

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[33/] The first bill was introduced on March 9, 1995 by Representative McCollum. H.R. 1184, 104th Cong. (1995). On March 30, 1995, broad regulatory relief bills were introduced in the House and Senate by Representative Bereuter and by Senators Shelby and Mack. H.R. 1362, S. 650, 104 Cong. (1995). On June 15, 1995, H.R. 1858 104th Cong. was introduced by Representative Leach.

[34/] H.R. 1184 contained language in Section 7, Limitation on Rescission Period and H.R. 1362 contained language in Section 111 which is identical to H.R. 1858, Section 113, quoted above. S. 650 similarly provided in Section 117, Limitation on Rescission, "no consumer may assert rescission affirmatively or as a defense" after 3 years and preempted "any State law that is inconsistent with any provision of this subsection." (*See* App. 3).

> credit, except as otherwise provided in the preceding sentence. This subsection shall supercede any State law which is inconsistent with this subsection.

H.R. 1858, 104th Cong. § 113 (1995).

While this provision was introduced at the behest of and with the strong backing of the mortgage lending industry,[35/] this absolute bar did not receive sufficient Congressional support to survive the legislative process. In the mark-up of the proposed legislation, the above-quoted language was deleted entirely.[36/] The 1995 Amendments to TILA were ultimately passed without amending 15 U.S.C. § 1635(f) in any way,[37/] and thus expressed a Congressional decision not to disturb the precedent set by *Dawe* and its progeny.

In June 1995 the House Banking Committee marked up House Bill 1858. In this mark-up, not only was the above-quoted language deleted[38/] from the proposed legislation, but

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[35/] *See infra* note 15.

[36/] Compare Section 111 of H.R. 1858, as introduced on June 15, 1995 by Representative Leach (which contains language creating an absolute limitation on the right to rescind, quoted above) with subtitle A of Title I of H.R. 1858 as reported out of the House Committee on Banking and Financial Services on July 18, 1995 which no longer contains a provision amending 15 U.S.C. § 1635(f). *(See* App. 4).

[37/] Compare 15 U.S.C.S. § 1635(f) (Law Co-op 1993) (pre-1995 Amendments) *with* 15 U.S.C.S. 1635 (Law Co-op Suppl. 1997) (amending § 1635, but leaving § 1635(f) undisturbed.

[38/] *See Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1327 (7th Cir.1997), where the court was persuaded that more restrictive language from an earlier draft of a statutory amendment was evidence that Congress had been aware of the discord on the issue and

(continued...)

a new section was added creating special protections for homeowners in foreclosure.[39/] In September 1995, shortly before enacting the 1995 TILA Amendments, Congress struck a compromise on the long term viability of rescission rights by adding a provision--15 U.S.C. § 1635(i)(3)--expressly permitting borrowers in foreclosure to raise rescission as a claim in recoupment after three years:

> **§1635. Right of rescission as to certain transactions. . . . (i) Rescission rights in foreclosure.** . . .(3) Right of recoupment under State law. Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.[40/]

The legislation adopting this compromise language was passed by voice vote in the House on September 27, 1995,[41/] and by voice vote in the Senate on the following day. 141 Cong. Rec. S14568 (daily ed. Sept. 27, 1995). This legislation, which is known as the Truth in Lending Act

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[38/](...continued)
had considered and rejected the proposed language.

[39/] The amendments to TILA also granted retroactive immunity for a whole host of disclosure violations and drastically increased the numerical tolerances for errors in disclosing the finance charge. The section adding protections for homeowners in foreclosure reinstated liability for several categories of the otherwise forgiven errors and set a lower tolerance of $35 for homeowners in foreclosure. *See* sources cited *supra* note 21 and accompanying text (summary of legislative changes made by the 1995 Amendments).

[40/] The Truth in Lending Act Amendments of 1995, H.R. 2399, 104th Cong. (1995) (sponsored by Rep. Bill McCollum) as enacted in Pub. L. No. 104-29, 109 Stat. 271, 275-76 (codified in 15 U.S.C. § 1635 (1995)).

[41/] 141 Cong. Rec. H9513 (daily ed. Sept. 27, 1995).

Amendments of 1995, was signed into law by President Clinton on September 30, 1995. Pub. L. No. 104-29, 109 Stat. 271, 275-76 (codified at 15 U.S.C. § 1635(i) (1995); 141 Cong. Rec. H1185 (daily ed. Sept. 30, 1995). The industry cannot now engineer the judicial creation of an absolute three-year limit on the right to rescind which Congress made a clear and deliberate decision not to adopt.[42/]

B. The Plain Language of Subsection 1635(i)(3) Makes Clear that Rescission Rights Are Available to Homeowners in Foreclosure Where Raised as a Claim in Recoupment.

The inclusion of the provision allowing rescission in recoupment makes perfect sense. Subsections 1635(i)(1) & (2) plainly and simply state that borrowers in foreclosure may use

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[42/] There is no legislative history on Sections 108-114 (including the provision on rescission rights in foreclosure) of the 1995 Amendments as passed in September 1995. Therefore, Ocwen cannot now rely on comments by members of Congress in support of language that simply did not appear in the final legislation. (Ocwen's Opp. to Pet. for Cert. at 25-26). *See Heintz v. Jenkins*, 514 U.S. 291 (1995), where Heintz sought to rely on a statement by Congressman Annunzio that, despite Congress' having deleted an exemption for attorneys from the Fair Debt Collection Practices Act when amending the statute, a limited exemption for litigation activities would still be implied into the amended statute. "For one thing, the plain language of the Act itself says nothing about retaining the exemption in respect to litigation. They proposed alternative language designed to keep litigation activities outside the Act's scope, *but that language was not enacted.*" *Heintz*, 514 U.S. at 297-298 (citation omitted) (emphasis added). Similarly, the industry cannot rely on the comments of Senator Mack and Representative McCollum (both sponsors of the original language, creating an absolute limit on the right to rescind, quoted *supra* pp. 15-17) to support its position that Congress adopted an absolute limit on the right to rescind. Moreover, since Congress did not amend section 1635(f) in the 1995 Amendments, floor comments regarding this provision should not impact its construction in any way.

TILA rescission as a "sword" in the first three years. Other homeowners, whose rescission rights were not curtailed as a result of the 1995 Amendments, are able to rescind affirmatively within the first three years without being in foreclosure.[43/] In reviving the right of rescission with respect to certain disclosure violations, subsections 1635(i)(1) & (2) make clear that borrowers in foreclosure and borrowers whose rescission claims can be raised without being in foreclosure are subject to the same three-year limitation on affirmative claims.[44/] *See supra* notes 21-22.

The importance of the distinction between affirmative rescission and rescission in recoupment cannot be overstated.[45/] Subsection 1635(i)(3) cannot be used as a "sword," only as a "shield." When rescission is asserted as a claim in recoupment, a homeowner cannot recover damages or funds already paid to the lender, but can only diminish or extinguish future liability under a debt.[46/] The import of

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[43/] For example, a borrower who is unaware of his obligation to make a large balloon payment because the lender failed to disclose this balloon payment on the TILA disclosure can rescind affirmatively in the first three years without being in foreclosure. 15 U.S.C. §§ 1602(u), 1635.

[44/] A borrower in foreclosure whose TILA disclosure failed to include a $5,000 brokers fee in the finance charge or APR may file an affirmative action for rescission in the first three years.

[45/] The Florida Supreme Court's decision to deny rescission in recoupment to *all* homeowners after three years is driven, in part, by Florida's idiosyncratic recoupment doctrine. ***See Allie v. Ionata***, 503 So. 2d 1237 (Fla. 1987). ***See infra*** Section III. C.

[46/] Following a valid rescission in recoupment the homeowner offsets the amount left owing to the creditor with the amount of payments made on the loan and any fees charged to initially procure the loan. 15 U.S.C. § 1635(b). In many cases the rescinding homeowner will still

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subsection 1635(i)(3) is to *make clear* that the only way a borrower in foreclosure can assert a right of rescission beyond the statute of limitations is by raising a defensive claim in recoupment.

What is clear from the tracking of the history of these amendments is that the mortgage industry came to Congress seeking passage of a statute absolutely limiting the right of rescission. It is equally clear that the industry failed in this effort and is here seeking to have the legislative provision Congress refused to pass written into TILA.

As Senator Sarbanes stated on the Senate floor prior to passage of the 1995 Amendments:

> The bill before the Senate today improves significantly the measure passed by the House Banking Committee. *Under the original House Bill, consumers would have lost the right of rescission for a whole class of loans* even if the most egregious violations of the Truth in Lending Act were committed. The bill before the Senate preserves that vital consumer protection.

141 Cong. Rec. S14567 (daily ed. Sept. 28, 1995, remarks of Senator Sarbanes) (emphasis added).

[46/](...continued)
owe a sum *which must be repaid to the lender*. In others, where the homeowner's payments and fees have exceeded the amount owing to the lender, the homeowner will be able to extinguish future liability but will not be reimbursed for excess payments.

III. THE *BEACH* COURT'S ANALYSIS CONFLICTS WITH FEDERAL RECOUPMENT DOCTRINE AND DISREGARDS SUBSECTION 1635(i)(3).

The Florida Supreme Court in *Beach* determined that a homeowner in Florida could not assert the right to rescind a mortgage loan as a claim in recoupment after the expiration of three years. In so doing, the court purported to ground its decision in Florida law: "[W]e hold that under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f)." 692 So.2d at 153. In fact, the court rested its analysis upon an incorrect interpretation of federal law.

A. Federal Recoupment Doctrine Favors Defensive Claims in Recoupment.

The *Beach* decision cannot be reconciled with prior Supreme Court pronouncements on federal recoupment doctrine. In *Bull v. United States*, the Court determined that recoupment is always available as a defense as long as the main claim is timely. 295 U.S. 247, 262 (1935).

> Recoupment is in the nature of a defense arising out of some features of the transaction upon which the defendant's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely.

295 U.S. at 262.

The Court further elaborated on this doctrine in *United States v. Western Pacific Railroad*, determining that only the "clearest congressional language" would allow a court to deprive a party of the ability to raise a defensive claim in recoupment. 352 U.S. 59, 71 (1956). The Court further stated:

> We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without benefit of all the applicable law. If this litigation is not stale, then no issue in it can be deemed stale.

352 U.S. at 72.

The *Western Pacific* Court rests its analysis on a concept of fundamental fairness which is equally applicable here--if the claim of one party is viable and may be raised affirmatively, the defenses of another party relating to that claim must, in fairness, be permitted by way of recoupment.[47]

A homeowner's ability to rescind in recoupment is directly related to and limited by the lender's right to foreclose throughout the life of the mortgage.[48] Rescission is therefore properly raised in recoupment in response to such an action. A valid rescission voids the lender's security interest in the borrower's home. Since rescission deprives the lender of the legal authority to foreclose, federal recoupment doctrine

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[47] Contrary to the exaggerated assertions of Ocwen and the industry, the value of the borrower's rescission claim decreases significantly in the latter years of the mortgage term. For example, in most states, a rescinding borrower with a 30 year fixed rate mortgage who is in foreclosure after having made 345 of 360 payments on the mortgage would only be relieved of the obligation of paying the final 15 payments. This homeowner would not be able to recover interest and fees paid to the lender in excess of principal.

[48] The *Beach* court's premise that borrowers have "full control over . . . [the lender's] . . . 'ability to foreclose on its security interest in the residence'" is simply unsupportable. *Beach*, 692 So.2d at 152. In enacting §1635(i) Congress implicitly recognized that homeowners in foreclosure are vulnerable, financially at risk, and deserving of special protections. They are not "in control."

recognizes that it would be fundamentally unfair to allow a lender to foreclose beyond three years while denying the homeowner the corresponding right to assert a valid claim of rescission in defense to that action.

In *Reiter v. Cooper*, this Court expansively interpreted the federal recoupment doctrine expressed in *Western Pacific* as, "not just a narrow holding based on the United States setoff statute, but a general principle of recoupment applicable in other contexts." 507 U.S. 258, 264 (1993). Moreover, the Court referred favorably, *Id.*, to a Fifth Circuit decision which refused to deny recoupment in the face of statutory language that "discharged . . . all liability" if a lawsuit was not initiated within one year. *Distribution Servs., Ltd. v. Eddie Parker Interests, Inc.*, 897 F.2d 811 (5th Cir. 1990). The Fifth Circuit was unpersuaded by the argument that, "the recoupment action . . . inheres in the [statute and therefore] the basis for liability is also extinguished once the limitations period expires." *Id.* at 813. Similarly, the Court should be unpersuaded here.

B. The Florida Court's Failure to Consider Subsection 1635(i)(3) Was a Fatal Error.

In reaching its decision, the Florida Supreme Court failed to address the very provision which specifically applies to homeowners in foreclosure and permits the raising of claims for rescission in recoupment. The court simply states, "the new provision does not relate to this case's factual situation." *Beach*, 692 So. 2d at 151. This conclusion is perplexing. Subsection 1635(i) is entitled, "Rescission rights in foreclosure." The Beaches were in foreclosure and were asserting that they had rescission rights. Nothing could be more clear than that subsection 1635(i) was intended to apply to them. The legislative process leading up to the enactment of this subsection unequivocally supports the Beaches' assertion of their rescission claim. Section 1635(i)(3) is clearly before this Court on the facts presented here.

To the extent the Florida court relied on House Committee Report language in reaching any conclusions about the applicability of subsection 1635(i) to the Beaches' situation, its reliance was misplaced. *See Beach*, 692 So.2d at 149. As discussed in Section II, *supra*, the House Committee Report relied on by Ocwen preceded by several months the inclusion of subsection (i)(3) (rescission in recoupment) in the 1995 Amendments. At the time the Committee Report was written in July 1995, subsection 1635(i) contained only subsections (1) & (2) and, therefore, applied only to homeowners whose disclosure violations were "forgiven" and were being "revived" in foreclosure. (*See* App. 5). However, in September 1995, a new subsection 1635(i)(3) was added which was directly applicable to the Beaches in that it codified *Dawe* for all homeowners in foreclosure. Since the *Beach* court did not consider the application of subsection 1635(i)(3) to the Beaches' claim for rescission, its reasoning is fatally flawed.

C. The *Beach* Court's Substitution of Florida Law Improperly Restricted the Federal Right of Rescission.

Concluding that subsection 1635(i)(3) was inapplicable, the Florida Supreme Court improperly substituted its own judgment for that of Congress in determining the remedial right of rescission to be unavailable to the Beaches. The court's decision to deny rescission in recoupment to *all* homeowners after three years was driven, in part, by Florida's idiosyncratic recoupment doctrine. Under Florida law, the bringing of a timely claim not only revives an opponent's claims in recoupment to the extent of defending against that claim, but allows that party to obtain affirmative relief when raising a time-barred claim in recoupment.[49]

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[49] Recoupment is defined as, [t]he right of a defendant,

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Allie v. Ionata, 503 So. 2d 1237 (Fla. 1987). Contrary to *Beach*, Florida recoupment doctrine diverges rather dramatically from federal recoupment doctrine and cannot be relied upon to supplant or supercede a federal claim. *Testa v. Katt*, 330 U.S. 386 (1947).

Having improperly superimposed Florida recoupment doctrine on its analysis of a federal claim, the *Beach* court compounded its error by conducting an equitable analysis of rescission. [50/] This led the court to conclude that rescission is a penalty, *Beach* at 153, a conclusion in direct conflict with Congress' determination that TILA statutory damages (§ 1640(e)), not the right of rescission, function as a penalty.[51/] S. Rep. No. 96-368, at 32-33 (1980) *reprinted in* 1980 U.S.C.C.A.N. 236, 267-68. "[T]he remedy of

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[49/](...continued)

> in the same action, to cut down the plaintiff's demand either because the plaintiff has not complied with some cross obligation of the contract on which he sues or because he has violated some duty which the law imposes on him in the making or performance of that contract. Ballantine's Law Dictionary 1070 (3d ed. 1969).

Coxson v. Commonwealth Mortgage Co., 43 F.3d 189, 193 (5th Cir. 1995) (alteration in original) (citation omitted).

[50/] Moreover, the court's purported analysis of the equities in this case led it to an inexplicable and unsupportable conclusion that rescission would be inequitable in *all* cases.

[51/] *See also F.D.I.C. v. Hughes Dev. Co.*, 684 F. Supp. 616, 621-23 (D. Minn. 1988); *F.D.I.C. v. Monterrey, Inc.*, 847 F. Supp. 997, 1004, n.9 (D.P.R. 1994) in which the courts concluded that statutory damages are a penalty and could not be assessed against the FDIC, but rescission was not punitive and was therefore available to defend against the FDIC's claim. In *James v. Home Const. Co.*, 621 F.2d 727, 729-730 (5th Cir. 1980), the court concluded that TILA rescission is not a penalty and can therefore survive the death of the borrower.

rescission serves an equitable function. It does not serve a punitive one. Congress established punitive remedies in the TILA, in the form of statutory damages. . . ." *Thorp Loan and Thrift Co. v. Buckles*, 189 B.R. 752, 765 (Bankr. D. Minn. 1995).[52/]

The decision in *Beach* reveals the court's fundamental misapprehension of Congress' determination to create uniformity in credit practices through the self-enforcement scheme of TILA. Despite Congress' choice of rescission as the tool to insure compliance, the *Beach* court used Florida law to conclude otherwise, thereby improperly restricting access to this important federal claim. *Testa v. Katt*, 330 U.S. 386 (1947).

IV. RECISSION IN RECOUPMENT IS NECESSARY TO COMBAT WELL RECOGNIZED ABUSES IN THE HOME EQUITY LENDING MARKET.

In passing the Home Ownership and Equity Protection Act of 1994, Congress recognized the need to curtail abusive and predatory lending practices that have continued unchecked in some home equity lending markets, particularly to low income and older homeowners.[53/] Ocwen fails to address these

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[52/] The *Beach* court labors under the misconception that a borrower's extended right to rescind is somehow premised on the lender's bad faith. "This three-year extension [of the right of rescission], section 1635(f), *based on the lenders' bad faith* in not disclosing material terms, is the key provision at issue in this case." *Beach*, 692 So.2d at 147 n. 2. (emphasis added).

[53/]

> [HOEPA] prohibits unfair and deceptive practices which have robbed many Americans of their most valuable asset, their home. It also requires better disclosure of the cost and terms of high cost mortgages. This legislation should put an end to the

(continued...)

homeowners, to whom Congress accorded special protections only a few years ago by enacting HOEPA. Even though Congress *prohibited* certain loan provisions made in connection with a high cost mortgage, Ocwen would have this Court believe that a homeowner who was victimized by an illegal high cost mortgage should be unable to raise the *prohibited* terms in defense to a foreclosure after three years as a claim for rescission in recoupment.[54/]

One of the more egregious (and prohibited) abuses perpetrated by predatory, high cost lenders is to make short-term mortgage loans with a final balloon payment. For example, on a $25,000 mortgage loan, charging a 10% broker's fee and 15% interest, a lender might assess monthly payments of only $250.[55/] When the loan comes due in four

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[53/](...continued)

> ability of unscrupulous lenders to prey on senior citizens and other vulnerable homeowners. . . .

140 Cong. Rec. H6782, H6787 (daily ed. Aug. 4, 1994) (remarks of Rep. Kanjorski).

[54/] HOEPA prohibited certain loan terms, such as balloon payments on mortgages of less than 5 years duration, for "high cost" loans. Loans are considered to be "high cost" and therefore subject to additional protections and prohibitions under TILA if the "points and fees" on the loan exceed 8% of the total loan amount or the APR on the loan exceeds the yield on a comparable Treasury security by more than 10 percentage points. The remedy selected by Congress to enforce these prohibitions was the right of rescission. 15 U.S.C. §§ 1602(aa), 1639 (1994). However, no special limit on the right of rescission was created for HOEPA loans. Like all home secured loans, HOEPA loans are subject to the three-year limit in subsection 1635(f) (1994).

[55/] A $250 monthly payment on this loan represents a charge that is less than the monthly interest owing on the loan. This creates additional indebtedness that is added to the balance owing at the end of the loan term. When the monthly payment is less than the interest accruing on

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years, the homeowner would owe a balloon payment of $29,326.81, reflecting the entire principal of $25,000 plus the $4,326.81 in unpaid interest that accrued through negative amortization.

Under Ocwen's analysis, if this homeowner regularly made monthly payments for the full four year mortgage term but defaulted when the balloon came due, she would be denied the right to rescind the mortgage in recoupment. This result would nullify HOEPA's prohibitions on balloon mortgages and negatively amortizing loans.[56/] Such an analysis turns HOEPA on its head, encouraging abusive lenders to devise mortgage loans with affordable monthly payments and a large, negatively amortized balloon payment due at the end of a greater than three-year term.

Congress determined that the tool of choice to enforce the additional disclosure requirements of HOEPA and to deter prohibited terms in high cost loans was the right of rescission. 15 U.S.C. § 1639. The limitation period for the right of rescission in a HOEPA loan is identical to the limitation on rescission for all loans. It is therefore, implausible that Congress intended to deny the exercise of that tool to a homeowner whom HOEPA was clearly designed to protect.

Every day AARP is presented with elderly, unsophisticated homeowners whose TILA rights have been violated. While some of these lenders are regularly engaged in such egregious and pervasive practices as loan churning, failing to provide disclosures and extending credit without any reasonable expectation that the borrower will be able to repay,

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[55/](...continued)

the loan each month, the loan is one which is negatively amortizing.

[56/] HOEPA prohibits balloons with a term of less than five years on high cost mortgages. 15 U.S.C. §§ 1602, 1639.

their loan transactions are not necessarily subject to HOEPA. Moreover, many more subtle abuses occur in the lending process, for which TILA's strict liability serves as a check. The right to assert a claim of rescission in recoupment to defend against a foreclosure action is critical to TILA's statutory purpose to provide meaningful disclosure of credit terms and to balance the scales between lenders and consumers.

CONCLUSION

For the foregoing reasons, AARP respectfully requests that the judgment of the Florida Supreme Court be reversed. AARP urges this Court to rule that the statutory right of rescission provided by TILA is revived for a borrower in foreclosure and can be asserted defensively as a claim in recoupment beyond the three-year limit.

Respectfully submitted,

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Counsel for *Amicus Curiae*
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November 26, 1997

Appendix

APPENDICES

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2: Brief on Appeal of American Bankers Ass'n *et al Amici Curiae* at 7-12, *In re Botelho,* 195 B.R. 558 (Bankr. D. Mass. 1996), *appeal docketed, Citicorp Mortgage Inc. v. Botelho*, (1st Cir. May 7, 1997) (No. 87-1535) 3a

3: H.R. 1184, §7, 104th Cong (1995); H.R. 1362, §111 104th Cong. (1995); H.R. 1858,§113 104th Cong. (1995); S. 650 § 117 104th Cong.(1995) . . 11a

4: H.R. 1858,§111 104th Cong. (1995) *as introduced, on June 15, 1995*, and H.R. 1858, Title I, subtitle A (bill as reported out of committee) 19a

5: *Financial Institutions Regulatory Relief Act of 1995*, House Rept. No, 104-193, § 133 . . . . . 27a

APPENDIX 1

Congress of the United States
House of Representatives
Washington, DC 20515-0005

How Can A $12 Error Cost $30,000?

March 8, 1995

Dear Colleague:

Extraordinary penalties for inconsequential errors threaten the mortgage industry. As a result, over 50 class action lawsuits have been filed since March '94 which were filed in response to technical problems with the Truth In Lending Act (TILA).

The TILA requires that lenders reveal credit terms to borrowers in a manner that allows them to objectively compare different credit products. Under TILA, refinance and second mortgage loans can be rescinded for up to three years for minor discrepancies in the disclosure statement of as little as $10. On a typical $120,000 refinance loan at 8% with $3,000 in closing costs, rescission in the third year for a $12 technical disclosure error could result in a penalty to the lender of more than $30,000.

These problems recently surfaced as a result of the *Rodash v. AIB Mortgage* decision in the 11th Circuit court. In *Rodash,* the court held that intangible taxes and courier fees imposed by a third party settlement agent were improperly disclosed to the "amount financed" rather than as part of the "finance charge." In other words, these items were in the wrong column. In accordance with the law, the court ordered the rescission of a mortgage loan nearly one year after the closing. Furthermore, the lender was required to return all

closing costs (including those paid to third parties) and interest paid by the borrower.

The mortgage lending industry faces dire consequences if loans are rescinded in significant numbers. Since 1991, 11.8 million loans totalling $1.3 trillion have been refinanced. All of these refinance loans are potentially subject to rescission. Estimated interest and closing costs, which is the potential cost of rescission of these loans, adds up to approximately $217 billion.

The exposure from this litigation potentially could impair the safety and soundness of all types of lenders---thrifts, banks and mortgage bankers. In addition, this litigation will increase the cost of buying a home.

Today, I am introducing the "Truth In Lending Act Amendments of 1995," which provides the technical changes necessary to clarify the treatment of fees and charges and expand the tolerance for finance charge errors. I invite you to co-sponsor this critical piece of legislation. To do so, please call Tom Rosenkoetter on my staff at 5-2176.

Sincerely,

/s/ Bill McCollum
BILL McCOLLUM
Member of Congress

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 97-1535

CITICORP MORTGAGE, INC.,
Appellant,

v.

DOROTHY BOTELHO,
Appellee.

BRIEF OF *AMICI CURIAE*
AMERICAN BANKERS ASSOCIATION,
AMERICA'S COMMUNITY BANKERS,
CONSUMER BANKERS ASSOCIATION,
AMERICAN FINANCIAL SERVICES ASSOCIATION,
CONSUMER MORTGAGE COALITION,
MASSACHUSETTS BANKERS ASSOCIATION,
MORTGAGE BANKERS ASSOCIATION OF AMERICA,
FEDERAL HOME LOAN MORTGAGE CORPORATION
AND FEDERAL NATIONAL MORTGAGE ASSOCIATION
URGING REVERSAL OF THE DECISION BELOW

Peter E. Gelhaar
(BBO No. 188310)
DONNELLY, CONROY
& GELHAAR, LLP
One Post Office Square
Boston Massachusetts 02109
(617) 542-7400

* * * *

[7] or other holder of the mortgage in this example is tremendous. Rather than keeping the interest paid and recovering the remaining principal, a total of $160,212.84, the lender receives a tender of only $25,170.10 — a loss of 85%.

The real life example in the case at bar is also illustrative. Dorothy Botelho suggested in her Bankruptcy Court filings that her $59,100 loan be credited with over $32,000 because of the rescission. The principal balance which Botelho claimed she owed Citicorp would be $22,729.17. As part of her bankruptcy plan, Botelho proposes only to tender back, on a five-year payment plan, $6,750 of that principal. Rather than ending up with over $90,000, representing the principal balance and previously-paid interest, if the decision below is affirmed and Botelho's proposal plan approved, Citicorp would be left with less than $10,000.

The potential for losses on any market wide measure is also great. *Amici* know of no reliable estimate of the magnitude of TILA violations that might render older loans rescindable, but the danger is real. In Congressional testimony, the Chairman of the Federal Deposit Insurance Corporation stated that "the complexity of Regulation Z [that implements TILA] is such that the FDIC cited more than 2,700 of the 3,500 institutions we examined in 1994 for at least one violation." *Hearing on Senate Bill 650 before Subcommittee on Financial Institutions and Regulatory Relief of the Senate Committee on Banking, Housing and Urban Affairs*, 104th Cong., 1st Sess. (May 2, 1995).

Technical violations of TILA are not unusual; truth in lending disclosures are highly detailed. Lenders strive for one hundred per cent accuracy in compliance, but in such a large

industry and with such a difficult statute to work with, errors do occur. [8] Unfortunately, only a small tolerance is permitted for certain errors in the numerical aspects of the disclosure process and no tolerance is allowed concerning certain mistakes in the form or content of disclosures given. *See* 15 U.S.C. §1635(i)(1)(use of wrong form of disclosure), §1635(i)(2)(disclosure error of only $35.00 renders loan subject to rescission in foreclosure). The loan by Citicorp to Botelho is a case in point. The error Botelho alleges permits her to rescind her $5^1/_2$ year old debt was Citicorp's use of the wrong form for disclosures. There was nothing inaccurate about the numerical disclosures that were made, and no suggestion by Botelho or her counsel at any time in this case that she was misled or misunderstood her commitment. Rather, the objective of her suit is to use a technical mistake to escape her agreement to repay a loan.

Using estimates only, *amici* believe that the value of older mortgage loans that, at any one time, are newly subject to rescission in foreclosure could exceed $1 billion.[4] If even

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[4] In order to be at risk for rescission beyond the three year expiration of the rescission right, the loan would have to (i) be more than three years old, (ii) be in foreclosure and (iii) be rescindable under TILA, because it is a qualifying loan (a non-purchase money loan, such as a refinancing) and contains one of the relevant TILA errors that would allow rescission under 15 U.S.C. § 1635. At any one time, if *Botelho* is affirmed, *amici* estimate that $1,000,000 in loans in foreclosure might newly be subject to rescission.

The calculation of this estimate is straightforward. According to recent figures, total single family mortgage debt currently is in excess of $3.8 trillion. *Inside Mortgage Finance*, at 4 (Nov. 1, 1996). Of that, about $1.4 trillion in loans was more than three years old. (*Inside Mortgage Finance*, at 15 (February 2, 1996)($2.4 trillion in loans originated during period 1993-1995). One industry estimate puts at least 0.67% of all loans in foreclosure at one time. *Inside Mortgage Finance*, at 12 (Sept. 13, 1996).

only [9] a small percentage of those with a rescindable loan will attempt to rescind in foreclosure, the industry impact could run into the hundreds of millions of dollars each year.

In addition to hard losses, the *Botelho* decision, if affirmed, also could have a negative effect on the sale of loans in the secondary mortgage market. If mortgages become less certain, interest rates will have to rise to make up for the higher collection risks. Ultimately, the consumer could pay in the form of higher interest rates on home loans.

2. The Ability To Rescind Loans Many Years After The Closing Is Likely To Encourage Litigation And Cause Fraud And Abuse.

A second result of the ruling below is the risk that in creating a right in equitable recoupment to exercise an equitable rescission, the Bankruptcy Court may have touched off a flood of litigation. Having obtained a favorable ruling at the trial court level, there is substantial evidence that consumers and their advocates already are using the *Botelho* case actively to challenge foreclosures in the federal courts of Massachusetts. This litigation, if it fully develops, will

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That yields an estimated total of loans in foreclosure of about $9.68 billion. Although there is no way to determine how many qualifying loans have TILA errors that would allow rescission, one group of consumer lawyers believes such violation to be common enough that "[a]dvocates representing clients in [connection with foreclosure] who do not evaluate the case for the possibility of Truth in Lending rescission are flirting with malpractice." K. Keest and G. Klein, *Truth in Lending*, 3d ed., § 1.1.2 at 33 (Nat'l Cons. Law Ctr. 1995 & 1996 Supp.). If one presumes that only 10% of all loans in foreclosure are subject to TILA rescission (which generally applies only to refinancings and requires the existence of a disclosure error sufficient to allow rescission) it would mean that approximately $1,000,000,000 in loans in foreclosure at any one time may potentially be subject to rescission due to the principles articulated in *Botelho*.

plunge the Bankruptcy and District Courts even further into traditional state law matters concerning mortgages and foreclosures. This Court should stem the tide by reversing the lower court.

Botelho's counsel, during the argument in the District Court, expressed the view that the *Botelho* case is not likely to cause substantial additional litigation. *Amici* respectfully disagrees, and point to a number of pieces of evidence that this case on appeal will have that effect. *Amici* are aware of at least three lawsuits, relying on or citing *Botelho* or its principles, pending or recently pending in lower federal courts in this District alone. The example of Florida also is instructive. As noted above, the Florida Supreme Court recently held that TILA rescission claims may not be raised in response to a foreclosure if the statute of [10] repose period has run. *Beach* v. *Great Western Bank*, 692 So. 2d 146 (Fla. 1997). That decision disposed of not only the dispute between Great Western and the Beaches, but similar claims made in three additional lawsuits that already were in the appellate courts of Florida. *Kasket* v. *Chase Manhattan Mortgage Corp.*, 1997 Fla. App. LEXIS 5627 (Fla. App. 4th Dist. May 21, 1997); *Key Savings Bank, F.S.B.* v. *Dean*, 1997 Fla. App LEXIS 5628 (Fla. App. 4th Dist. May 21, 1997); *Great Western Bank* v. *Shoemaker*, 1997 Fla. App. LEXIS 5382 (Fla. App. 2d Dist. May 16, 1997). *Amici* are generally aware of some two dozen cases in the trial courts of Florida in the last several years in which late rescissions were attempted. It would not be surprising to see the same phenomenon repeated in Massachusetts federal and state courts, as well as in courts across the country.

Fraud and abuse may well be a feature of many of such suits. *Beach* v. *Great Western Bank*, 670 So. 2d 986, 991 (Fla. App. 4th Dist. 1996) (recognizing danger that borrowers

unrestricted by the repose deadline can default strategically).[5] The case of *Signet Mortgage Corp.* v. *Tucker*, C.A. No. 96-10932-REK (D. Mass.), recently before Judge Keeton, provides what *amici* believe is a chilling example of how *Botelho* principles are likely to be [11] misused. In the *Tucker* case, the borrower had obtained a loan in early 1988 in the amount of $105,000, but subsequently had been chronically late on payments, missed many months, and was in and out of bankruptcy three times. *See generally Deposition of Donald Keith Tucker* (Feb. 21, 1997).[6] In 1995, he approached a "mortgage counselor" for assistance. *Id.*, at 78-79, 85-86. According to the testimony in the case, upon review of the loan documents the counselor opined that

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[5] There is no merit in the Bankruptcy Court's contrary speculation that lenders act in bad faith and abuse the right to foreclose, waiting until after the repose deadline so as to avoid a rescission. *Botelho*, 195 B.R. at 566, citing *Dawe v. Merchants & Trust*, 683 P.2d at 801, and *Federal Deposit Insurance Corp. v. Ablin*, 177 Ill. App. 3d 390, 395, 532 N.E. 2d 379 (1988). The realities of modern mortgage banking make such abuse highly unlikely. Many mortgages are now "serviced" (i.e., payments collected, records kept, escrow accounts managed) under contracts which, within a range of some discretion, generally provide that foreclosure proceedings must be started within 3-9 months of default. *See Freddie Mac Single Family Seller/Servicer Guide*, Ch. 66-9; *Fannie Mae Single Family Servicing Guide*, Part VIII, § 102; *Federal Housing Administration Handbook*, 7.12(D). *See also Beach* v. *Great Western Bank*, 670 So. 2d at 990 ("[m]odern banking regulations make this [the prospect of lenders waiting out the three year period and then foreclosing] highly unlikely.") Moreover, the lost interest earned on sums tied up in a delinquent mortgage loan is incentive enough for any lender or servicer to foreclose in a reasonable time after default.

[6] The transcript of the Tucker deposition was filed in *Signet* v. *Tucker* with the District Court for the District of Massachusetts in connection with a Motion for Summary Judgment, attached to the Affidavit of Thomas M. Hefferon, Esq. (March 5, 1997).

TILA "had been broken" in his case, told him that he had a right to rescind the loan under certain circumstances, and advised him to stop paying on the loan, which he did. *Id.*, 79-80, 89, 97. She referred him to a Boston attorney (*id.*, at 86, 90), who, after the lender initiated foreclosure, purported to rescind the loan on the borrower's behalf. *Id.*, at 133. Rather than being able to foreclose on a defaulted borrower, the lender ended up in the federal courthouse.[7]

While a number of suits and counterclaims attempting late rescissions have been filed, *amici* are fearful of many more to come. At least one Massachusetts Continuing Legal Education ("MCLE") program for members of the bar has trumpeted *Botelho* as the centerpiece for a seminar. The seminar announcement invited attorneys to learn:

- How to avoid a mortgage, rendering the balance due an unsecured claim.
- How to require a lender to credit all payments on a mortgage to reduction of principal, effectively turning a traditional interest-bearing promissory note into an interest-free loan.
- How to raise federal [12] Truth-in-Lending Act violations as defenses to a foreclosure action, even though the statute of limitation for bringing such actions has expired.

See "Consumer Finance Regulation," advertising Jan. 28, 1997 MCLE Seminar (attached hereto as Exhibit A).

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[7] Judge Keeton ultimately granted Signet's summary judgment motion, which had sought judgment on the grounds that the borrower had no TILA rescission right at all because the loan was secured by rental property, not the borrower's residence. Final Judgment (March 12, 1997), *Signet v. Tucker*, C.A. No. 96-10932-REK (D. Mass.).

Comments by other attorneys suggest the possibility that a defensive rescission claim should be considered in response to every attempted foreclosure. *See Loan Rescinded For a $28 Charge Understatement*, 25 Massachusetts Lawyers Weekly 1911 (May 19, 1997) (quoting Edward K. O'Brien, Esq.: "between this case (*Mayo v. Key Financial Services, Inc.*, 424 Mass. 862, 678 N.E. 2d 1311 (1997) allowing for a rescission and a couple of other cases coming from the Bankruptcy Court in Massachusetts, any borrower faced with a foreclosure action owes it to him or herself to seek counsel familiar with recent rescission cases — regardless of how old the loan is."); K. Keest and G. Klein, *Truth in Lending* § 1.1.2 at 33 (rescission considered as defense to any foreclosure).

It is the nature of our adversary system that the *Botelho* decision is already being used, and may be used to an increasing degree, to defeat or hold up legitimate foreclosures on mortgages which were assumed valid for many years. Borrowers are even using it to default strategically. The consequences of an avalanche of individual cases, each prosecuted individually, would have a significant impact industry wide. That is the concern of *amici*, and one reason they appear here.

* * * *

APPENDIX 3

104TH CONGRESS
1ST SESSION

H. R. 1184

IN THE HOUSE OF REPRESENTATIVES

March 9, 1995

Mr. McCollum (for himself, Mr. Leach, Mrs. Roukema, Mr. Bereuter, Mr. Roth, Mr. Baker of Louisiana, Mr. Lazio of New York, Mr. Bachus, Mr. Castle, Mr. King, Mr. Royce, Mr. Weller, Mr. Ehrlich, Mr. Chrysler, Mr. Cremeans, Mr. Heineman, and Mr. LoBiondo) introduced the following bill, which was referred to the Committee on Banking and Financial Services

A BILL

To amend the Truth in Lending Act to clarify the intent of such Act and to reduce burdensome regulatory requirements on creditors.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Truth in Lending Act Amendments of 1995".

* * *

SEC. 7. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following sentences: "The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of

the 3-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection''.

104TH CONGRESS
1ST SESSION

H. R. 1362

To reduce paperwork and additional regulatory burdens for depository institutions.

IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 1995

Mr. BEREUTER (for himself, Mr. LEACH, Mr. MCCOLLUM, Mrs. ROUKEMA, Mr. ROTH, Mr. BAKER of Louisiana, Mr. LAZIO of New York, Mr. BACHUS, Mr. ROYCE, Mr. WELLER, Mr. KING, Mr. BONO, Mr. EHRLICH, Mr. CHRYSLER, Mr. CREMEANS, Mr. WATTS of Oklahoma, Mrs. KELLY, Mr. BARRETT of Nebraska, Mr. ORTON, Mr. CASTLE, Mr. HEINEMAN, Mr. LATHAM, Mr. CHRISTENSEN, and Mr. FOX of Pennsylvania), introduced the following bill; which was referred to the Committee on Banking and Financial Services

A BILL

To reduce paperwork and additional regulatory burdens for depository institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Financial Institutions Regulatory Relief Act of 1995''.

* * *

SEC. 111. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following

sentences: ''The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action in any State or Federal court after the earlier of the end of the three-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection.''.

104 H.R. 1858 printed in full format.

FULL TEXT OF BILLS

104TH CONGRESS; 1ST SESSION
IN THE HOUSE OF REPRESENTATIVES
AS INTRODUCED IN THE HOUSE

H. R. 1858

1995 H.R. 1858; 104 H.R. 1858

< =1 > Retrieve Bill Tracking Report

* * *

DATE OF INTRODUCTION: JUNE 15, 1995

DATE OF VERSION: JUNE 21, 1995 — VERSION: 1

SPONSOR(S):
Mr. LEACH introduced the following bill; which was referred to the Committee on Banking and Financial Services

TEXT:
* Be it enacted by the Senate and House of Representatives *
* of the United States of America in Congress assembled, *

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Financial Institutions Regulatory Relief Act of 1995''.

* * *

SEC. 111. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following sentences: ''The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action

in any State or Federal court after the earlier of the end of the 3-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection.''.

104TH CONGRESS
1ST SESSION

S. 650

To increase the amount of credit available to fuel local, regional, and national economic growth by reducing the regulatory burden imposed upon financial institutions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 30 (legislative day, MARCH 27), 1995

Mr. SHELBY (for himself, Mr. MACK, Mr. D'AMATO, Mr. BRYAN, Mr. BENNETT, Mr. FAIRCLOTH, Mr. BOND, Mr. GRAMM, and Mr. DOLE) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

A BILL

To increase the amount of credit available to fuel local, regional, and national economic growth by reducing the regulatory burden imposed upon financial institutions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Economic Growth and Regulatory Paperwork Reduction Act of 1995''.

* * *

SEC. 117. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended—

(1) by striking ''(f) An obligor's right of rescission'' and inserting the following:

''(f) LIMITATION ON RESCISSION PERIOD.—

''(1) IN GENERAL.—The right of rescission of an obligor'':

(2) by striking ''except that if (1) any agency'' and inserting the following: ''except that if—

''(A) any agency'';

(3) by striking ''transaction, (2) such agency'' and inserting the following: ''transaction;

''(B) such agency'';

(4) by striking ''section 125, and (3) the obligor's'' and inserting the following: ''this section; and

''(C) the obligor's''; and

(5) by adding at the end the following new paragraphs:

''(2) ACTIONS AFFECTED.—Except as otherwise provided in paragraph (1), the expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action brought under this title in any State or Federal court after the earlier of—

''(A) the expiration of the 3-year period beginning on the date on which the transaction is consummated; or

''(B) the date of the sale of the property securing the loan or other extension of credit.

''(3) PREEMPTION OF STATE LAW.—This subsection shall supersede any State law that is inconsistent with any provision of this subsection.''.

APPENDIX 4

104 H.R. 1858 printed in full format.

FULL TEXT OF BILLS

104TH CONGRESS; 1ST SESSION
IN THE HOUSE OF REPRESENTATIVES
AS INTRODUCED IN THE HOUSE

H. R. 1858

1995 H.R. 1858; 104 H.R. 1858

<=1> Retrieve Bill Tracking Report

DATE OF INTRODUCTION: JUNE 15, 1995

DATE OF VERSION: JUNE 21, 1995 — VERSION: 1

SPONSOR(S):
Mr. LEACH introduced the following bill; which was referred to the Committee on Banking and Financial Services

TEXT:
* Be it enacted by the Senate and House of Representatives *
* of the United States of America in Congress assembled, *

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''Financial Institutions Regulatory Relief Act of 1995''.

* * *

SEC. 111. LIMITATION ON RESCISSION PERIOD.

Section 125(f) of the Truth in Lending Act (15 U.S.C. 1635(f)) is amended by adding at the end the following sentences: ''The expiration of the right of rescission pursuant to this subsection shall be absolute and no consumer may assert rescission, affirmatively or as a defense, in any action

in any State or Federal court after the earlier of the end of the 3-year period beginning on the date of the consummation of the transaction or the sale of the property securing the loan or other extension of credit, except as otherwise provided in the preceding sentence. This subsection shall supersede any State law which is inconsistent with any provision of this subsection.''

104 H.R. 1858 printed in FULL format.

FULL TEXT OF BILLS

104TH CONGRESS; 1ST SESSION
IN THE HOUSE OF REPRESENTATIVES
AS REPORTED IN THE HOUSE

H. R. 1858

1995 H.R. 1858; 104 H.R. 1858

<=1> Retrieve Bill Tracking Report

SYNOPSIS:
A BILL To reduce paperwork and additional regulatory burdens for depository institutions.

DATE OF INTRODUCTION: JUNE 15, 1995

DATE OF VERSION: JULY 19, 1995 — VERSION: 2

SPONSOR(S):
Mr. LEACH introduced the following bill; which was referred to the Committee on Banking and Financial Services

TEXT:

H. R. 1858

Report No. 104-193

A BILL

To reduce paperwork and additional regulatory burdens for depository institutions.

JULY 18, 1995

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

Union Calendar No. 98

104TH CONGRESS
1ST SESSION

H. R. 1858

Report No. 104-193

To reduce paperwork and additional regulatory burdens for depository institutions.

IN THE HOUSE OF REPRESENTATIVES

JUNE 15, 1995

Mr. LEACH introduced the following bill; which was referred to the Committee on Banking and Financial Services.

* * *

(b) CLERICAL AMENDMENT.—The table of sections for chapter 2 of the Truth in Lending Act is amended by inserting after the item relating to section 138 the following new item:

''139. Certain limitations on liability.''.

SEC. 110. LIMITATION ON RESCISSION LIABILITY.

Section 125 of the Truth in Lending Act (15 U.S.C. 1635) is further amended by adding at the end the following new subsection:

''(h) LIMITATION ON RESCISSION.—AN OBLIGOR SHALL HAVE NO RESCISSION RIGHTS ARISING FROM THE FORM OF WRITTEN NOTICE USED BY THE CREDITOR TO INFORM THE OBLIGOR OF THE RIGHTS OF THE OBLIGOR UNDER THIS SECTION, IF THE CREDITOR PROVIDED THE OBLIGOR THE APPROPRIATE FORM OF WRITTEN NOTICE PUBLISHED AND ADOPTED BY THE BOARD, OR A

COMPARABLE WRITTEN NOTICE OF THE RIGHTS OF THE OBLIGOR, THAT WAS PROPERLY COMPLETED BY THE CREDITOR.''.

SEC. 111. CALCULATION OF DAMAGES.

Section 130(a)(2)(A) of the Truth in Lending Act (15 U.S.C. 1640 (a)(2)(A)) is amended—

(1) by striking ''or (ii)'' and inserting ''(ii)''; and

(2) by inserting before the semicolon at the end the following: '', or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $250 or greater than $2,500''.

SEC. 112. ASSIGNEE LIABILITY.

(a) VIOLATIONS APPARENT ON THE FACE OF TRANSACTION DOCUMENTS.—Section 131 of the Truth in Lending Act (15 U.S.C. 1641) is amended by adding at the end the following new subsection:

''(e) LIABILITY OF ASSIGNEE FOR CONSUMER CREDIT TRANSACTIONS SECURED BY REAL PROPERTY.—

''(1) IN GENERAL.—Except as otherwise specifically provided in this title, any civil action against a creditor for a violation of this title, and any proceeding under section 108 against a creditor, with respect to a consumer credit transaction secured by real property may be maintained against any assignee of such creditor only if—

''(A) the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement provided in connection with such transaction pursuant to this title; and

"(B) the assignment to the assignee was voluntary.

"(2) VIOLATION APPARENT ON THE FACE OF THE DISCLOSURE DESCRIBED.—For the purpose of this section, a violation is apparent on the face of the disclosure statement if—

"(A) the disclosure can be determined to be incomplete or inaccurate from the face of the disclosure statement, any itemization of the amount financed, or any other disclosure of disbursement; or

"(B) the disclosure statement does not use the terms or format required to be used by this title.".

(b) SERVICER NOT TREATED AS ASSIGNEE.—Section 131 of the Truth in Lending Act (15 U.S.C. 1641) is amended by inserting after subsection (e) (as added by subsection (a) of this section) the following new subsection:

"(f) TREATMENT OF SERVICER.—

"(1) IN GENERAL.—A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section unless the servicer is the owner of the obligation.

"(2) SERVICER NOT TREATED AS OWNER ON BASIS OF ASSIGNMENT FOR ADMINISTRATIVE CONVENIENCE.—A servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the obligation. Upon written

request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation or the master servicer of the obligation.

"(3) SERVICER DEFINED.—For purposes of this subsection, the term 'servicer' has the same meaning as in section 6(i)(2) of the Real Estate Settlement Procedures Act of 1974.".

SEC. 113. RESCISSION RIGHTS IN FORECLOSURE.

Section 125 of the Truth in Lending Act (15 U.S.C. 1635) is amended by inserting after subsection (h) (as added by section 110) the following new subsection:

"(i) RESCISSION RIGHTS IN FORECLOSURE.—

"(1) IN GENERAL.—NOTWITHSTANDING SECTION 139, AND SUBJECT TO THE TIME PERIOD PROVIDED IN SUBSECTION (F), IN ADDITION TO ANY OTHER RIGHT OF RESCISSION AVAILABLE UNDER THIS SECTION FOR A TRANSACTION, UPON AN ACTION OF A CREDITOR TO EXECUTE FORECLOSURE ON THE PRIMARY DWELLING OF AN OBLIGOR SECURING AN EXTENSION OF CREDIT, THE OBLIGOR SHALL HAVE A RIGHT TO RESCIND THE TRANSACTION EQUIVALENT TO OTHER RESCISSION RIGHTS PROVIDED BY THIS SECTION, IF—

"(A) A MORTGAGE BROKERS FEE IS NOT INCLUDED IN THE FINANCE CHARGE IN ACCORDANCE WITH THE LAWS AND REGULATIONS IN EFFECT AT THE TIME THE CONSUMER CREDIT TRANSACTION WAS CONSUMMATED; OR

"(B) THE FORM OF NOTICE OF RESCISSION FOR THE TRANSACTION IS NOT THE APPROPRIATE FORM OF WRITTEN NOTICE PUBLISHED AND ADOPTED BY THE BOARD OR A COMPARABLE WRITTEN NOTICE, OR WAS NOT PROPERLY COMPLETED BY THE CREDITOR.

"(2) TOLERANCE FOR DISCLOSURES.—NOTWITHSTANDING SECTION 106(F), AND SUBJECT TO THE TIME PERIOD PROVIDED IN SUBSECTION (F), FOR THE PURPOSES OF EXERCISING ANY RESCISSION RIGHTS FOLLOWING AN ACTION BY A CREDITOR TO FORECLOSE ON THE PRINCIPAL DWELLING OF THE OBLIGOR SECURING AN EXTENSION OF CREDIT, THE DISCLOSURE OF THE FINANCE CHARGE AND OTHER DISCLOSURES AFFECTED BY ANY FINANCE CHARGE SHALL BE TREATED AS BEING ACCURATE FOR PURPOSES OF THIS SECTION IF THE AMOUNT DISCLOSED AS THE FINANCE CHARGE DOES NOT VARY FROM THE ACTUAL FINANCE CHARGE BY MORE THAN $35 OR IS GREATER THAN THE AMOUNT REQUIRED TO BE DISCLOSED UNDER TITLE.".

APPENDIX 5

[2] 104th Congress; 1st Session

House Rpt. 104-193 (1 of 2, Due to its size, this report has been split into two sections.)

104 H. Rpt. 193

FINANCIAL INSTITUTIONS REGULATORY RELIEF ACT OF 1995

DATE: July 18, 1995. Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

SPONSOR: Mr. Leach submitted the following Report

COMMITTEE: from the Committee on Banking and Financial Services

(To accompany H.R. 1858)
(Including cost estimate of the Congressional Budget Office)
together with MINORITY AND ADDITIONAL VIEWS

TEXT:

The Committee on Banking and Financial Services, to whom was referred the bill (H.R. 1858) to reduce paperwork and additional regulatory burdens for depository institutions, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

* * *

[19] SEC. 113. RESCISSION RIGHTS IN FORECLOSURE.

Section 125 of the Truth in Landing Act (15 U.S.C. 1635) is amended by inserting after subsection (h) (as added by section 110) the following new subsection:

''(i) Rescission Rights in Foreclosure.

''(1) In general. Notwithstanding section 139, and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, upon an action of a creditor to execute foreclosure on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if

''(A) a mortgage brokers fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

''(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, or was not properly completed by the creditor.

''(2) Tolerance for disclosures. Notwithstanding section 106(f), and subject to the time period provided in subsection (f), for the purposes of exercising any rescission fights following an action by a creditor to foreclose on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance

charge does not vary from the actual finance charge by more than $ 35 or is greater than the amount required to be disclosed under this title.''.

* * *

[120] Section 113. Rescission Rights in Foreclosure

This amendment adds a new subsection to section 125 of TILA giving consumers the right to rescind a loan within the three-year time period established in section 125(f) of TILA as a defense if the creditor brings an action to foreclose on the consumer's principal dwelling in three specific instances: improper treatment of borrower-paid mortgage broker fees in calculating the finance charge, use of the incorrect form of notice of the right of rescission, and disclosure of a finance charge which understates the actual finance charge by more than $ 35. The consumer protection provisions of this section are intended to benefit consumers that are unable to meet their mortgage obligations and are not intended as a mechanism whereby consumers can avoid their obligations by defaulting and then raising the defense in foreclosure. Nothing in this section is intended to override the exceptions to the rights of rescission created in section 125(e).

Section 125(f) of TILA provides that the consumer's right of rescission expires on the earlier of three years after the date of consummation of the transaction or upon the sale of the property even if the consumer has not received the required disclosures or forms. Rescission rights expire in three years. The time period shall not be extended except as explicitly provided in section 125(f) relating to agency enforcement proceedings. However, section 125(f) does not affect any equitable remedies that may be available under State or common law.